

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

NATIONSTAR MORTGAGE, LLC,

Case No. 2:15-CV-909 JCM (CWH)

Plaintiff(s),

## ORDER

V.

ALEX BEREZOVSKY, et al.,

**Defendant(s).**

13 Presently before the court is defendant/counterclaimant Alex Berezovsky's  
14 ("Berezovsky") motion for summary judgment. (ECF No. 44). Plaintiff/counterdefendant  
15 Nationstar Mortgage, LLC ("Nationstar") filed a response (ECF No. 55), to which Berezovsky  
16 replied (ECF No. 61).

17       Also before the court is plaintiff Nationstar’s motion for summary judgment. (ECF No.  
18 46). Defendant Tanglewood Homeowners Association (the “HOA”) filed a response (ECF No.  
19 53), as did Berezovsky (ECF No. 54). No reply was filed, and the period to do so has since passed.

20       Also before the court is the HOA's motion for summary judgment. (ECF No. 48).  
21       Berezovsky filed a joinder to the motion. (ECF No. 50). Nationstar filed a response (ECF No.  
22       56), to which the HOA replied (ECF No. 62).

## I. Facts

24        This case involves a dispute over property that was subject to a homeowners'  
25 association's superpriority lien for delinquent assessment fees. On December 29, 2005, Curtis  
26 Barschdorf and Gayle Ann Barschdorf (the "borrowers") obtained a \$230,800.00 loan from  
27 Countrywide Bank, N.A. ("Countrywide") to purchase the property located at 6529 Hartwood  
28 Road, Las Vegas, Nevada 89108 (the "property"). (ECF No. 1 at 3).

1           The loan was secured by a first deed of trust encumbering the property, which was  
 2 recorded on November 22, 2006. (ECF No. 46-1 at 2–18). Under the first deed of trust,  
 3 Mortgage Electronic Registration Systems, Inc. (“MERS”) was named nominee-beneficiary for  
 4 Countrywide. (ECF No. 46-1 at 2–18).

5           On June 29, 2010, Hampton & Hampton (“H&H”), as the HOA’s authorized trustee,  
 6 recorded a notice of delinquent assessment lien on behalf of the HOA. (ECF No. 46-1 at 23–24).  
 7 The notice asserted that the borrowers owed \$1,256.00 in fees. (ECF No. 46-1 at 23–24). On  
 8 January 29, 2013, H&H mailed (by certified mail, return receipt requested) a notice of delinquent  
 9 assessment lien to the borrowers. (ECF No. 44-1 at 16–25). The notice asserted that the  
 10 borrowers owed \$2,120.00 in fees. (ECF No. 44-1 at 16–25).

11           On February 28, 2013, Bank of America, N.A. (“BANA”), successor by merger to BAC  
 12 Home Loans Servicing, LP, fka Countrywide Home Loans Servicing, LP (“BAC”), assigned the  
 13 deed of trust to Nationstar. (ECF No. 46-1 at 20–21).

14           On March 15, 2013, the HOA recorded a notice of default and election to sell under the  
 15 HOA lien. (ECF No. 44-2 at 2–3). The notice of default asserted that the borrowers owed  
 16 \$2,933.00 in fees. (ECF No. 44-2 at 2–3). On March 20, 2013, H&H mailed a copy of the  
 17 notice of default to the borrowers (by certified mail, return receipt requested) and to the  
 18 beneficiaries of record, which included MERS and BAC (by first class mail). (ECF No. 44-2 at  
 19 5–12).

20           On April 1, 2013, the corporation assignment of deed of trust was recorded, wherein  
 21 Nationstar obtained all beneficial interest under the deed of trust securing the property from  
 22 BANA. (ECF No 46-1 at 20–21).

23           On May 8, 2013, Nationstar recorded a notice of default and election to sell against the  
 24 property. (ECF No. 46-1 at 78–83). The notice of default asserted that the borrowers owed  
 25 \$268,170.37. (ECF No. 46-1 at 78–83).

26           On August 20, 2013, H&H mailed a notice of trustee’s sale to the borrowers (by certified  
 27 mail, return receipt requested) and to the beneficiaries of record, which included MERS, BAC,  
 28 and Nationstar. (ECF No. 44-2 at 14–22). The notice asserted that the “sale will be made . . . to

1 pay the remaining principal sum due . . . plus fees and costs of the Trustee, to wit: \$4,112.00  
 2 (Accrued interest and additional advances, if any, will increase this figure prior to sale.).” (ECF  
 3 No. 44-2 at 14–22). On August 22, 2013, H&H recorded the notice of trustee’s sale. (ECF No.  
 4 44-2 at 24–26).

5 On October 9, 2013, H&H held a foreclosure sale, and Borozovsky purchased the  
 6 property for \$5,100.00. (ECF No. 44-2 at 28–31). On October 22, 2013, H&H recorded the  
 7 trustee’s deed upon sale. (ECF No. 44-2 at 28–31).

8 Nationstar filed the original complaint on May 13, 2015, asserting four claims against  
 9 Berezovsky and the HOA (collectively, “defendants”): (1) declaratory relief/quiet title; (2) unjust  
 10 enrichment; (3) injunctive relief against Berezovsky; and (4) violation of procedural due process.  
 11 (ECF No. 1). Plaintiff contends that the HOA foreclosure sale violated NRS 116.31162(6), that  
 12 the sale should be set aside as it was commercially unreasonable, and that Nevada’s statutory  
 13 scheme providing superpriority liens to homeowner’s associations is violative of procedural due  
 14 process under the Constitution. (ECF No. 1).

15 The HOA filed a motion to dismiss on June 17, 2015, seeking dismissal of plaintiff’s  
 16 claims. (ECF No. 7). This court dismissed Nationstar’s claims for unjust enrichment and  
 17 violation of procedural due process pursuant to an unopposed motion to dismiss. (ECF No. 47).

18 On October 2, 2015, Berezovsky filed an answer and verified counterclaim, asserting  
 19 claims of quiet title and declaratory relief against the borrowers, Nationstar, and Richland  
 20 Holdings, Inc. d/b/a Acctcorp of Southern Nevada. (ECF No. 22).

21 In the instant motions, Berezovsky, the HOA, and Nationstar all seek summary judgment  
 22 declaring the rightful holder of title to the property.

23 Berezovsky and the HOA<sup>1</sup> assert that summary judgment in their favor is proper because  
 24 the foreclosure sale extinguished Nationstar’s deed of trust pursuant to NRS 116.3116 and *SFR*  
 25 *Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014) (“*SFR Investments*”) and  
 26 because Nationstar has not met the fraud, unfairness, or oppression requirement to set aside a

---

27  
 28 <sup>1</sup> Berezovsky and the HOA filed separate motions for summary judgment but proffer the same arguments.

foreclosure sale as outlined in *Shadow Wood Homeowners Assoc. v. N.Y. Cmty. Bancorp., Inc.*, 366 P.3d 1105, 1112 (Nev. 2016) (“Shadow Wood”). (ECF Nos. 44, 48).

Nationstar contends that summary judgment in its favor is proper because the foreclosure sale was commercially unreasonable, the foreclosure sale is void because the trustee violated NRS 116.3116(6), *SFR Investments* should not be applied retroactively, and the foreclosure sale is invalid because the notice scheme of NRS Chapter 116 is facially unconstitutional. (ECF No. 46).

The court will address each in turn.<sup>2</sup>

## II. Legal standard

The Federal Rules of Civil Procedure allow summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

For purposes of summary judgment, disputed factual issues should be construed in favor of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts showing that there is a genuine issue for trial.” *Id.*

In determining summary judgment, a court applies a burden-shifting analysis. The moving party must first satisfy its initial burden. “When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontested at trial. In such a case, the moving party has

<sup>2</sup> As an initial matter, the court takes judicial notice of the following recorded documents: first deed of trust (ECF No. 46-1 at 2–18); notice of delinquent assessment (ECF No. 46-1 at 23–24); notice of default and election to sell (ECF No. 44-2 at 2–3); corporate assignment of deed of trust (ECF No. 46-1 at 20–21); notice of trustee’s sale (ECF No. 44-2 at 24–26); and trustee’s deed upon sale (ECF No. 44-2 at 28–31). *See, e.g., United States v. Corinthian Colls.*, 655 F.3d 984, 998–99 (9th Cir. 2011) (holding that a court may take judicial notice of public records if the facts noticed are not subject to reasonable dispute); *Intri-Plex Tech v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

1 the initial burden of establishing the absence of a genuine issue of fact on each issue material to  
 2 its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)  
 3 (citations omitted).

4 By contrast, when the nonmoving party bears the burden of proving the claim or defense,  
 5 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
 6 element of the non-moving party’s case; or (2) by demonstrating that the non-moving party failed  
 7 to make a showing sufficient to establish an element essential to that party’s case on which that  
 8 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving  
 9 party fails to meet its initial burden, summary judgment must be denied and the court need not  
 10 consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–  
 11 60 (1970).

12 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
 13 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
 14 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
 15 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
 16 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
 17 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,  
 18 631 (9th Cir. 1987).

19 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
 20 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,  
 21 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
 22 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
 23 for trial. *See Celotex*, 477 U.S. at 324.

24 At summary judgment, a court’s function is not to weigh the evidence and determine the  
 25 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*  
 26 *Inc.*, 477 U.S. 242, 249 (1986). Nonmovant’s evidence is “to be believed, and all justifiable  
 27 inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is  
 28

1 merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at  
 2 249–50.

3 **III. Discussion**

4 Under Nevada law, “[a]n action may be brought by any person against another who claims  
 5 an estate or interest in real property, adverse to the person bringing the action for the purpose of  
 6 determining such adverse claim.” Nev. Rev. Stat. § 40.010. “A plea to quiet title does not require  
 7 any particular elements, but each party must plead and prove his or her own claim to the property  
 8 in question and a plaintiff’s right to relief therefore depends on superiority of title.” *Chapman v.*  
 9 *Deutsche Bank Nat’l Trust Co.*, 302 P.3d 1103, 1106 (Nev. 2013) (citations and internal quotation  
 10 marks omitted). Therefore, for claimant to succeed on its quiet title action, it needs to show that  
 11 its claim to the property is superior to all others. *See also Breliant v. Preferred Equities Corp.*,  
 12 918 P.2d 314, 318 (Nev. 1996) (“In a quiet title action, the burden of proof rests with the plaintiff  
 13 to prove good title in himself.”).

14 **A. Nev. Rev. Stat. § 116.3116<sup>3</sup>**

15 Section 116.3116(1) of the Nevada Revised Statutes gives a HOA a lien on its  
 16 homeowners’ residences for unpaid assessments and fines; moreover, NRS 116.3116(2) gives  
 17 priority to that HOA lien over all other liens and encumbrances with limited exceptions—such as  
 18 “[a] first security interest on the unit recorded before the date on which the assessment sought to  
 19 be enforced became delinquent.” Nev. Rev. Stat. § 116.3116(2)(b).

20 The statute then carves out a partial exception to subparagraph (2)(b)’s exception for first  
 21 security interests. *See* Nev. Rev. Stat. § 116.3116(2). In *SFR Investments*, the Nevada Supreme  
 22 Court provided the following explanation:

23 As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces,  
 24 a superpriority piece and a subpriority piece. The superpriority piece, consisting of

25 <sup>3</sup> The 2015 Legislature substantially revised Chapter 116. 2015 Nev. Stat., ch. 266.  
 26 Notably, all of the events that give rise to this litigation occurred prior to October 1, 2013, except  
 27 the foreclosure sale, which occurred on October 8, 2013. Because Chapter 116 operates by  
 28 allowing a foreclosure sale only after specific conditions are met, the court must look at the statutes  
 in effect on the day of the sale: October 8, 2013. *See* Nev. Rev. Stat. § 116.31162 (providing that  
 the association may foreclose its lien by sale after all of the following occur). As such, the  
 references in this order to statutes codified in Chapter 116 are to the statutes in effect on that date  
 unless otherwise noted.

1 the last nine months of unpaid HOA dues and maintenance and nuisance-abatement  
 2 charges, is “prior to” a first deed of trust. The subpriority piece, consisting of all  
 other HOA fees or assessments, is subordinate to a first deed of trust.

3 334 P.3d at 411.

4 Chapter 116 of the Nevada Revised Statutes permits a HOA to enforce its superpriority  
 5 lien by nonjudicial foreclosure sale. *Id.* at 415. Thus, “NRS 116.3116(2) provides an HOA a true  
 6 superpriority lien, proper foreclosure of which will extinguish a first deed of trust.” *Id.* at 419; *see also* Nev. Rev. Stat. § 116.31162(1) (providing that “the association may foreclose its lien by sale”  
 7 upon compliance with the statutory notice and timing rules).

8 The holder of a first deed of trust may pay off the superpriority interest to keep its interest  
 9 from being extinguished upon foreclosure of an HOA superpriority lien. *See SFR Investments,*  
 10 334 P.3d at 414 (“But as a junior lienholder, U.S. Bank could have paid off the SHHOA lien to  
 11 avert loss of its security . . . .”); *see also 7912 Limbwood Ct. Trust v. Wells Fargo Bank, N.A., et*  
 12 *al.*, 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013) (“If junior lienholders want to avoid this result,  
 13 they readily can preserve their security interests by buying out the senior lienholder’s interest.”  
 14 (citing *Carillo v. Valley Bank of Nev.*, 734 P.2d 724, 725 (Nev. 1987); *Keever v. Nicholas Beers*  
 15 *Co.*, 611 P.2d 1079, 1083 (Nev. 1980))).

16 **1. *Foreclosure deed recitals***

17 Defendants assert that they have met their burden to show good title in Berezovsky because  
 18 the foreclosure sale complied with NRS 116.3116 and *SFR Investments*. (ECF Nos. 44 at 6–8; 48  
 19 at 7–8). Defendants argue that the recorded foreclosure deed provides conclusive effect regarding  
 20 the statutory prerequisites to a valid HOA lien foreclosure sale. (ECF Nos. 44 at 8–10; 48 at 12).  
 21 Thus, as defendants maintain, the foreclosure sale extinguished Nationstar’s deed of trust as a  
 22 matter of law. (ECF Nos. 44 at 8–10; 48 at 12).

23 In response, Nationstar argues that defendants’ reliance on the foreclosure deed’s recitals  
 24 to prove—as a matter of law—that the foreclosure sale quiets title, is contrary to the court’s holding  
 25 in *Shadow Wood*. (ECF No. 55 at 7–8). Nationstar claims that the foreclosure deed’s recitals, as  
 26 held in *Shadow Wood*, are conclusive proof only as to default, notice, and publication of the notice  
 27 of sale; and are not conclusive as to commercial reasonableness. (ECF No. 55 at 8).

1                   The court agrees with Nationstar's argument. NRS 116.31166(1) provides:

2                   The recitals in a deed made pursuant to NRS 116.31164 of:

3                   (a) Default, the mailing of notice of delinquent assessment, and the recording  
 4                   of the notice of default and election to sell;

5                   (b) The elapsing of the 90 days; and

6                   (c) The giving of notice of sale,

7                   Are conclusive proof of the matters recited.

8                   Nev. Rev. Stat. § 116.31166(1).

9                   NRS 116.31166's enactment[] did not eliminate the equitable authority of the  
 10                  courts to consider quiet title actions when an HOA's foreclosure deed contains  
 11                  conclusive recitals. We therefore reject [the] contention that NRS 116.31166  
 12                  defeats, as a matter of law, [an] action to set aside the trustee's deed and to quiet  
 13                  title in itself.

14                  *Shadow Wood*, 366 P.3d at 1112.

15                  Here, defendants have provided the recorded trustee's deed upon sale (ECF Nos. 44-2 at  
 16                  28–31; 48-9 at 2–5), as well as the recorded notice of delinquent assessment (ECF No. 48-4 at 2–  
 17                  3), the recorded notice of default and election to sell (ECF Nos. 44-2 at 2–3; 48-5 at 2–3), and the  
 18                  recorded notice of trustee's sale (ECF Nos. 44-2 at 24–24; 48-7 at 2–4). Pursuant to NRS  
 19                  116.31166, these recitals in the recorded foreclosure deed are conclusive to the extent that they  
 20                  implicate compliance with the default, notice, publication of the notice of default, and timing  
 21                  statutory prerequisites of a valid foreclosure provided under NRS 116.31162 through NRS  
 22                  116.31164.

23                  In light of the foregoing, the court will grant defendants' motions for summary judgment  
 24                  as they relate to the foreclosure sale's compliance with the statutory prerequisites to the extent set  
 25                  forth in NRS 116.31166. Importantly, while NRS 116.31166 accords certain deed recitals  
 26                  conclusive effect, it does not conclusively, as a matter of law, entitle a claimant to success on its  
 27                  quiet title claim. *Shadow Wood*, 336 P.3d at 1112.

28                  **2. NRS 116.31162(6)**

29                  Though the foreclosure deed recitals are conclusive as to the limited matters mentioned  
 30                  above, NRS 116.31162(6)'s prerequisites fall outside the scope of those recitals. Nationstar  
 31                  disputes the validity of the foreclosure sale, claiming that the sale took place despite Nationstar's  
 32                  recorded notice of default and without a mediation certificate—contrary to NRS 116.31162(6).  
 33                  (ECF No. 46 at 6–7). Nationstar asserts that the notice of default it recorded on May 8, 2013 (ECF

1 No. 46-1 at 78–83), is conclusive that the foreclosure sale was not properly conducted and is void.  
 2 (ECF No. 46 at 6–7).

3 In response, the HOA argues that the codified version of Assembly Bill 273 omits the  
 4 relevant provision that applied NRS 116.31162(6) to “trust agreements for which a notice of  
 5 default and election to sell is recorded on or after October 1, 2013.” (ECF No. 53 at 9–10).  
 6 Particularly, the HOA asserts that Nationstar failed to record a notice of default on or after October  
 7 1, 2013, rendering NRS 116.31162(6) inapplicable. (ECF No. 53 at 9–10).

8 The court agrees. Under Nevada law, any discrepancies between the Statutes of Nevada  
 9 and the Nevada Revised Statutes that the legislative counsel was not authorized to make are  
 10 resolved in favor of the language contained in the former. *See* Nev. Rev. Stat § 220.170(3). The  
 11 difference between the two here is the language that this act only applies “with respect to trust  
 12 agreements for which a notice of default and election to sell is recorded on or after October 1,  
 13 2013.” *See* 2013 Nev. Stat. 3484. Nevada law does not authorize the legislative counsel to “alter  
 14 the sense, meaning or effect of any legislative act.” Nev. Rev. Stat. § 220.120.

15 Omission of this language would change the effect of the legislative act. By removing the  
 16 effective date for notices of default, the Nevada Revised Statute greatly enhances whom the  
 17 legislature intended to protect when it enacted Nevada Statute 3484. The legislative counsel edited  
 18 beyond its authority, such that the Nevada Statute must control.

19 Moreover, defendants are correct in their assertion that a genuine dispute of material fact  
 20 still exists as to whether the property was “owner-occupied housing” at the time of the foreclosure  
 21 sale. (ECF No. 53 at 11). Nationstar has provided no evidence supporting this element of NRS  
 22 116.31162(6)’s defense to a foreclosure sale.

23 Because Nationstar did not record a notice of default against the property after October 1,  
 24 2013, the court finds NRS 116.31162(6)’s defense is inapplicable to Nationstar in this case.

25 **B. Commercial Unreasonableness**

26 Nationstar asserts that the foreclosure sale is void because the purchase price of \$5,100.00  
 27 in light of the \$126,500.00 property appraisal value is grossly inadequate as the purchase price is  
 28 4% of the property’s value. (ECF No. 46 at 5–6).

1       In *Shadow Wood*, the Nevada Supreme Court held that an HOA’s foreclosure sale may be  
 2 set aside under a court’s equitable powers notwithstanding any recitals on the foreclosure deed  
 3 where there is a “grossly inadequate” sales price and “fraud, unfairness, or oppression.” 366 P.3d  
 4 at 1110; *see also Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 184 F. Supp. 3d 853 (D. Nev.  
 5 2016). In other words, “demonstrating that an association sold a property at its foreclosure sale  
 6 for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud,  
 7 unfairness, or oppression.” *Id.* at 1112; *see also Long v. Towne*, 639 P.2d 528 (Nev. 1982).

8       **1. Inadequate Price**

9       Nationstar argues that the purchase price of \$5,100.00 in light of the \$126,500.00 property  
 10 appraisal value is grossly inadequate as the purchase price is 4% of the property’s value. (ECF  
 11 No. 46 at 5–6). As support, Nationstar provides the appraisal report of Matthew Lubawy, wherein  
 12 Lubawy concluded that on the date of the foreclosure sale, October 8, 2013, the property’s value  
 13 was \$126,000.00. (ECF No. 46-1 at 44–76).

14       The general rule for gross inadequacy of sales price requires 20% of fair market value. *See*  
 15 *Shadow Wood*, 366 P.3d at 1112. In *Shadow Wood*, the court remanded for further fact-finding,  
 16 but noted that in the past it had declined to set aside sales for as low as 28.5% and that the apparent  
 17 23% ratio in the case before it was not “obviously” inadequate. *See id.* (citing *Golden v. Tomiyasu*,  
 18 387 P.2d 989, 993 (Nev. 1963); Restatement (Third) of Prop.: Mortgages § 8.3 cmt. b (1997)).

19       Here, Nationstar has satisfied its initial burden as to gross inadequacy by setting forth  
 20 evidence that the property was purchased at the foreclosure sale for 4% of its market value. (*See*  
 21 deed of trust, ECF No. 46-1 at 2–18 (securing \$230,800.00); Lubawy report, ECF No. 46-1 at 44–  
 22 76 (estimating \$126,000.00 value on date of foreclosure sale); foreclosure deed, ECF No. 46-1 at 33–36  
 23 (indicating sale for \$5,100.00)); *see also Nationstar Mortg., LLC*, 184 F. Supp. 3d at 857  
 24 (finding sale price of less than 5% of the secured amount sufficient to satisfy initial burden of  
 25 showing gross inadequacy). Even assuming that the fair market value was only half of the  
 26 appraised amount (*i.e.*, \$63,000.00), the sale price would still be only 8%, which is less than half  
 27 the amount generally required for gross inadequacy.

28

1           Defendants do not dispute \$126,000.00 being a fair market value; rather defendants take  
 2 issue with the method by which that value was computed. (ECF No. 53 at 3). While defendants  
 3 assert that Nationstar's appraiser failed to consider relevant factors, they fail to produce any  
 4 evidence to support a showing of a genuine issue for trial. *See Celotex*, 477 U.S. at 324; *Nationstar*  
 5 *Mortg., LLC*, 184 F. Supp. 3d at 857 (denying summary judgment on gross inadequacy because  
 6 opposing expert report concluded fair market value of \$9,000.00 based on similar homes sold for  
 7 similar amounts at similar HOA sales; finding reasonable jury could accept this theory over the  
 8 traditional sales of comparable properties).

9           In addition, defendants argue that Lubawy's expert report is inadmissible as it lacks  
 10 foundation and that it cannot be used to support a motion for summary judgment. (ECF No. 53 at  
 11 3). The court disagrees.

12           Rule 56(c)(2) controls objections of facts not supported by admissible evidence and states  
 13 that a "party may object that the material cited . . . cannot be presented in a form that would be  
 14 admissible in evidence." Fed. R. Civ. P. 56(c)(2). The form of the evidence is not the focus of  
 15 analysis for the purposes of summary judgment. *Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th  
 16 Cir. 2003). "We instead focus on the admissibility of [the evidence's] contents." *Id.* (finding that  
 17 a diary, though hearsay, could be admitted in an alternative form at trial and therefore be used as  
 18 evidence on summary judgment).

19           While Nationstar has met its initial burden of showing a grossly inadequate sale price, it  
 20 must also show fraud, unfairness, or oppression.

21           **2. Fraud, Unfairness, or Oppression**

22           On a motion for summary judgment, Nationstar must also demonstrate sufficient grounds  
 23 to justify setting aside the foreclosure sale. In other words, inadequate price is not enough to  
 24 warrant setting aside a foreclosure sale; there must also be a showing of fraud, unfairness, or  
 25 oppression. *See Shadow Wood*, 366 P.3d at 1112; *Long*, 639 P.2d at 530.

26           Nationstar attempts to claim that a grossly inadequate price alone is enough to show fraud,  
 27 unfairness, or oppression. (ECF No. 46 at 5). Nationstar relies on its assertion that the Nevada  
 28 Supreme Court adopted the Restatement in *Shadow Wood* to prove it has met its burden at trial.

1 (ECF No. 56 at 6–7). In support, Nationstar quotes a parenthetical explanation, which quotes the  
 2 Restatement, and attempts to pass it off as the court’s holding in *Shadow Wood*.

3 The *Shadow Wood* court makes no such holding. (ECF No. 46 at 5). Furthermore, no  
 4 language exists in *Shadow Wood* that exhibits the Nevada Supreme Court’s intention to adopt the  
 5 Restatement. *Compare Shadow Wood*, 366 P.3d at 1112 (citing the Restatement as secondary  
 6 authority to warrant use of the 20% threshold test for grossly inadequate sales price), *with St. James*  
 7 *Village, Inc. v. Cunningham*, 210 P.3d 190, 213 (Nev. 2009) (explicitly adopting § 4.8 of the  
 8 Restatement in specific circumstances); *Foster v. Costco Wholesale Corp.*, 291 P.3d 150, 153  
 9 (Nev. 2012) (“[W]e adopt the rule set forth in the Restatement (Third) of Torts: Physical and  
 10 Emotional Harm section 51.”); *Cucinotta v. Deloitte & Touche, LLP*, 302 P.3d 1099, 1102 (Nev.  
 11 2013) (affirmatively adopting the Restatement (Second) of Torts section 592A).

12 Because Nevada courts have not adopted the relevant section(s) of the Restatement at issue  
 13 here, the *Long* test, which requires a showing of fraud, unfairness, or oppression in addition to a  
 14 grossly inadequate sale price to set aside a foreclosure sale, controls. *See* 639 P.2d at 530.

15 Nationstar also argues that the timing of the foreclosure sale as it relates to the effective  
 16 date of NRS 116.31162(6) satisfies unfairness under the *Long* test. (ECF No. 55 at 12). As  
 17 previously concluded, Nevada law clearly defines what law controls in the circumstance of a  
 18 discrepancy. *See* Nev. Rev. Stat § 220.170(3); Nev. Rev. Stat § 220.120. That Nationstar failed  
 19 to timely identify this discrepancy is unfortunate, but it is not conclusive as to unfairness. Though  
 20 it is true that Nationstar had only eight (8) days after the effective date of the amended NRS  
 21 116.31162 to record a new notice of default, it had at least 111 days to understand the change in  
 22 law and prepare accordingly. *See* 2013 Nev. Stat. 3484 (approved by the governor on June 12,  
 23 2013). The evidence presented creates a genuine dispute of material fact, and one that a reasonable  
 24 jury could find constitutes unfairness.

25 Moreover, when sitting in equity, “courts must consider the entirety of the circumstances .  
 26 . . . This includes considering the status and actions of all parties involved including whether an  
 27 innocent party may be harmed by granting the desired relief.” *Shadow Wood*, 366 P.3d at 1114  
 28 (citation omitted).

### 3. *Bona Fide Purchaser*

Nationstar contends that Berezovsky is not a *bona fide* purchaser as he had notice of Nationstar's competing interest at the time of the foreclosure sale. (ECF No. 55 at 12–19). Defendants argue that a recorded deed of trust is not enough to establish notice as to a competing interest, but evidence that Berezovsky had actual notice of a dispute between the HOA and Nationstar is required. (ECF No. 61 at 10–12).

A subsequent purchaser is *bona fide* if it takes the property (1) for value, and (2) without notice of a competing interest. *Id.* at 1115 (citing *Bailey v. Butner*, 176 P.2d 226, 234 (Nev. 1947)). Moreover, that the competing interest could bring an equitable claim to challenge the foreclosure sale is not enough in itself to demonstrate notice of any potential future dispute as to title. *Id.* at 1116.

Defendants are correct: the deed of trust alone is not enough to establish *bona fide* purchaser status. *See id.* However, Nationstar presented evidence of a previously recorded notice of default against the property. (ECF No. 46-1 at 78–83) That Berezovsky sought, and received, information about the property from the Clark County records adequately establishes notice of the potentially competing default. (ECF No. 55-4 at 11–14).

Though the recorded deed of trust alone is not enough to question Berezovsky's status as a *bona fide* purchaser, when combined with Nationstar's notice of default and Berezovsky's inquiry into the property's recorded history, a genuine dispute of material fact exists.

Thus, the court finds genuine disputes of material fact exist, and will deny defendants' motions as they relate to commercial unreasonableness.

### C. Retroactive application of *SFR Investments*

Nationstar posits that the court should not apply *SFR Investments* retroactively to extinguish its deed of trust. (ECF No. 46 at 11–13).

The retroactivity issue has been certified to the Nevada Supreme Court in other district of Nevada cases. *See, e.g., Christiana Trust v. K&P Homes*, No. 2:15-cv-1534, 2016 WL 923091, at \*2 (D. Nev. Mar. 9, 2013). Therefore, the court will not issue a ruling on the issue of retroactivity at this time. If this case should conclude in defendants' favor, the court will then determine

1 whether to stay judgment during the pendency of the Nevada Supreme Court's resolution of the  
 2 issue. Accordingly, the court will deny defendants' motion for summary judgment as to this issue.

3 **D. Due Process**

4 In its motion, Nationstar asserts that the foreclosure sale is invalid as the notice scheme of  
 5 NRS Chapter 116 is facially unconstitutional and in violation of due process. (ECF No. 46 at 7–  
 6 11).

7 Defendants argue that the foreclosure sale could not be unconstitutional because it lacked  
 8 state action. (ECF No. 53 at 6–7). Defendants also contend that Nevada has previously rejected  
 9 arguments concerning the constitutionality of Chapter 116's "opt-in" notice scheme. (ECF No. 53  
 10 at 8–9).

11 The Ninth Circuit held that NRS 116.3116's "opt-in" notice scheme, which required a  
 12 HOA to alert a mortgage lender that it intended to foreclose only if the lender had affirmatively  
 13 requested notice, facially violated mortgage lenders' constitutional due process rights. *Bourne*  
 14 *Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154, 1157–58 (9th Cir. 2016). The  
 15 *Bourne* court also held that the Nevada legislature's enactment of Chapter 116 constituted state  
 16 action. *Id.* at 1154. Therefore, *Bourne Valley* clearly rejects both of defendants' arguments. *See*  
 17 *id.*

18 Notwithstanding the fact that this court has already dismissed Nationstar's quiet title claim  
 19 against the HOA "insofar as it relies on a due process theory" (ECF No. 47 at 6–7), Nationstar's  
 20 claim similarly fails. The facially unconstitutional provision, as identified in *Bourne Valley*, exists  
 21 in NRS 116.31163(2). *See id.* at 1158. At issue is the "opt-in" provision that unconstitutionally  
 22 shifts the notice burden to holders of the property interest at risk. Due process requires "notice  
 23 reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the  
 24 action and afford them an opportunity to present their objections." *Id.* at 1158 (quoting *Mennonite*  
 25 *Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983)) (internal quotation marks omitted).

26 Nationstar has not suffered an injury related to the unconstitutional provision in NRS  
 27 116.31163(2). To raise a question of constitutionality, the party must have sufficient Article III  
 28 standing, including, *inter alia*, a "personal injury fairly traceable to the . . . allegedly unlawful

1 conduct.” *Raines v. Byrd*, 521 U.S. 811, 818–19 (1997) (citing *Allen v. Wright*, 468 U.S. 737, 751  
2 (1984)) (emphasis omitted).

3 Here, adequate notice was given to the interested parties prior to extinguishing a property  
4 right. Nationstar recorded its interest in the property on April 1, 2013. (ECF No. 46-1 at 20–21).  
5 Prior to this recording, on March 20, 2013, the HOA notified interested parties of the potential  
6 foreclosure by sending them a notice of default and election to sell. (ECF No. 44-2 at 5–12).  
7 Nationstar was not entitled to this notification because, on March 20, 2013, Nationstar had not yet  
8 recorded its property interest.

9 After Nationstar recorded its interest in the property, it received adequate notice to satisfy  
10 due process. On August 20, 2013, the HOA again notified interested parties—this time including  
11 Nationstar—by sending them a notice of trustee’s sale. (ECF No. 44-2 at 14–22). The notice of  
12 trustee’s sale included (1) the name, address, and telephone number of the trustee conducting the  
13 sale, (2) the property at issue, (3) the time, date, and location that the sale will occur, and (4) the  
14 amount owed to satisfy the lien. (ECF No. 46-1 at 29–31). Whereas notice by mail to ensure  
15 actual notice is the minimum constitutional requirement, the notice here specifically laid out  
16 procedures to prevent extinguishment of the property interest. *See Mennonite*, 462 U.S. at 800.

17 As a result, the notice of trustee’s sale was sufficient notice to cure any constitutional defect  
18 inherent in NRS 116.31163(2) as it put Nationstar on notice that its interest was subject to  
19 pendency of action and offered all of the required information.

20 **IV. Conclusion**

21 Based on the foregoing, the court grants the HOA’s motion for summary as it relates to  
22 the foreclosure sale’s compliance with the statutory prerequisites to the extent set forth in NRS  
23 116.31166. Because the record prevents a finding that the foreclosure sale extinguished  
24 Nationstar’s deed of trust as a matter of law under NRS 116.3116, *SFR Investments*, and *Shadow*  
25 *Wood*, the court denies summary judgment as to the remaining issues.

26 ...

27 ...

28 ...

1                   Accordingly,

2                   IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the HOA's motion for  
3 summary judgment (ECF No. 48) be, and the same hereby is, GRANTED IN PART and  
4 DENIED IN PART, consistent with the foregoing.

5                   IT IS FURTHER ORDERED that Berezovsky's motion for summary judgment (ECF No.  
6 44) be, and the same hereby is, DENIED.

7                   IT IS FURTHER ORDERED that Nationstar's motion for summary judgment (ECF No.  
8 46) be, and the same hereby is, DENIED.

9                   IT IS FURTHER ORDERED that the HOA's amended stipulation for extension of time  
10 (ECF No. 43) be, and the same hereby is, DENIED as moot.

11                   DATED February 13, 2017.

12                     
13                   \_\_\_\_\_  
14                   UNITED STATES DISTRICT JUDGE